

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CECIL MCINTOSH, JR.,

Defendant-Appellee.

UNPUBLISHED

April 23, 1999

No. 210184

Recorder's Court

LC No. 97-005273

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Pursuant to the Supreme Court's order remanding this case to this Court for consideration as on leave granted, *People v Cecil McIntosh*, 456 Mich 944 (1998), the prosecutor appeals from the Recorder's Court order granting defendant's motion to suppress the lineup identification by Robert Williams. We remand.

Defendant was charged with one count of first-degree premeditated murder, MCL 750.316; MSA 28.548, two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The charges stem from an incident in which Torrence Bowers allegedly inadvertently cut off defendant in traffic. Defendant then passed Bowers on the left and cut in front of him. When the two cars stopped at the same traffic light, defendant pulled out a gun and began shooting, fatally wounding Bowers and injuring his two passengers, Eugene Anderson and Robert Williams. At a photographic lineup, Anderson identified defendant's photograph, but Williams did not.¹ At a subsequent corporeal lineup, both Anderson and Williams identified defendant. Defendant moved to suppress the identification testimony of Anderson and Williams on the basis that defendant was the only person in the corporeal lineup who was completely bald and had a forehead scar. After a *Wade*² hearing, the trial court found that the lineup was impermissibly suggestive with respect to Williams, but not with respect to Anderson.

On appeal, the prosecution argues that, where Anderson and Williams viewed the same lineup, the trial court erred in finding that the lineup was impermissibly suggestive with respect to Williams, but was not impermissibly suggestive with respect to Anderson. We review the trial court's ruling regarding the admission of identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505

NW2d 528 (1993)(Griffin, J). “Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Id.*

Pretrial identification procedures that are unnecessarily suggestive or conducive to irreparable mistaken identification can amount to a denial of due process. *People v Anderson*, 389 Mich 155, 168-169; 205 NW2d 461 (1973). However, a suggestive lineup is not necessarily a constitutionally defective lineup. *Kurylczuk, supra* at 306. To sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972); *Kurylczuk, supra* at 302, 306, 311-312. Among the factors to be considered are “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Neil, supra* at 199; *Kurylczuk, supra* at 306. If a pretrial identification procedure was impermissibly suggestive, testimony regarding the pretrial identification is inadmissible at trial. *Kurylczuk, supra* at 303. Where, as here, counsel was present at the identification procedures, the burden of proof is on the defendant to show that the lineup was impermissibly suggestive. *People v Horton*, 98 Mich App 62, 68; 296 NW2d 184 (1980).

If an identification procedure is found to be impermissibly suggestive or conducive to irreparable mistaken identification, the court must then determine whether the witness had an independent basis on which to identify the defendant in court. *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998). Whether an independent basis for an in-court identification exists must be viewed in light of the totality of the circumstances. *Id.* at 115. The factors to be considered include the witness’ prior relationship with or knowledge of the defendant, the witness’ opportunity to observe the offense, the length of time between the offense and the disputed identification, any accuracy or discrepancies in the pre-lineup or showup description and defendant’s actual description, any previous proper identification or failure to identify the defendant, a prior identification of another person as the defendant, the nature of the alleged offense and the physical and psychological state of the victim, and any idiosyncratic or special features of the defendant. *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977). The burden is on the prosecutor to show by clear and convincing evidence that there is an independent basis for the identification. *Id.* at 97.

The trial court did not articulate the basis for its finding that the corporeal lineup was impermissibly suggestive with respect to Williams, but not with respect to Anderson. Defendant asserts that what the court actually meant, but did not clearly state, was that the lineup was impermissibly suggestive with respect to both Anderson and Williams, but that Anderson’s identification testimony was admissible because an independent basis existed for his identification. However, we are reluctant to make this same inference given the trial court’s failure to make a specific finding to that effect and its conflicting statements regarding the applicability of *Kachar*. We therefore remand this case to the trial court for clarification of its ruling within 56 days of the release of this opinion. If the trial court intended to hold that Williams’ identification testimony is

inadmissible for want of an independent basis, the court shall make specific findings with respect to each of the *Kachar* factors.

Remanded for further proceedings consistent with this opinion. Jurisdiction is retained.

/s/ Martin M. Doctoroff

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

¹ The trial court ruled that the photographic lineup was not impermissibly suggestive. That ruling is not at issue on appeal.

² *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).